IN THE

Supreme Court of the United States

OCTOBER TERM 1979

No. ~~79~~ _____

~~CLINTON MANGES AND~~ DUVAL COUNTY RANCH COMPANY, INC., and Clinton Manges
Petitioners

v.

SIDNEY SPARKS and R. L. LYND, d/b/a SIDNEY SPARKS, TRUSTEE,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1979

No. ~~79-1385~~

~~CLINTON MANGES AND~~ DUVAL COUNTY RANCH COMPANY, INC., and Clinton Manges
Petitioners

v.

SIDNEY SPARKS and R. L. LYND, d/b/a SIDNEY SPARKS, TRUSTEE,
Respondents

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Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, Duval County Ranch Company, Inc. and Clinton Manges, pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The District Court's memorandum order is unreported. It is included in the Appendix contained in the Petition

for Writ of Certiorari submitted by Orville E. Dennis, No. 79-1186, at Page A-1 and the Judgment of the District Court appears in the Appendix at Page A-4, of said Petition.

The first opinion of the Court of Appeals, the per curiam panel opinion, is reported at 588 F.2d 124, and appears in the Appendix at Page A-5 of the Petition for Writ of Certiorari submitted by Orville E. Dennis. The opinion of the Court of Appeals on rehearing en banc is unreported, but is included in the Appendix at Page A-11, of said Petition. The Judgment of the Court of Appeals appears in the Appendix at Page A-41 of said Petition. The order of the Court of Appeals denying the Petition for Rehearing En Banc of Appellee, Orville E. Dennis, appears in the Appendix at Page A-43, of said Petition.

JURISDICTION

The opinion of the Court of Appeals on rehearing en banc was filed on October 22, 1979. The Judgment was entered on October 22, 1979. The order denying the Petition for Rehearing and Suggestion for Rehearing En Banc of Appellee, Orville E. Dennis, was entered on December 14, 1979. The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1254(1).

QUESTION PRESENTED FOR REVIEW

Whether a private citizen can be liable for damages under Title 42, United States Code, Section 1983, when he is an alleged co-conspirator with a state court judge who is immune from the Section 1983 claim under the doctrine of judicial immunity.

STATUTE INVOLVED

The federal statute involved is Title 42, United States Code, Section 1983 (Act of April 20, 1871, Chapter 22, Section 1, 17 Stat. 13), which reads as follows:

> "Sec. 1983. Civil action for deprivation of rights
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

In the District Court below, the Respondents allege that a Texas state district court judge, O. P. Carrillo, conspired with certain private individuals, Duval County Ranch Company, Inc., Clinton Manges, Clarence Martens and Orville E. Dennis, to deprive Respondents of their civil rights. The complaint for damages was brought under 42 United States Code, Section 1983.

In the Respondents' amended complaint, the alleged conspiracy is described as involving the conduct of Duval County Ranch Company, Inc., in suing the Respondents in state district court to wrongfully enjoin the Respondents from certain activity on an oil and gas lease, the judge's entry of a temporary injunction, and Martens and Dennis' signing as individual sureties on the bond required under state law for issuance of the temporary injunction. The temporary injunction was dissolved on appeal to a

Texas appellate court. *Winslow v. Duval County Ranch Company*, 519 S.W.2d 217 (Tex. Civ. App. 1975—Beaumont, writ ref'd n.r.e.).

The District Court below, on motions to dismiss submitted by Petitioners and the other defendants below, dismissed the amended complaint against all defendants. The District Court in its memorandum order premised the dismissal upon the state court judge's immunity from suit under 42 U.S.C., Section 1983.

The District Court found that the state judge's action of entering the injunction was a judicial act within his authority and jurisdiction. The District Court reasoned that, but for the entry of the injunction by the state judge, the Respondents would not have suffered the alleged injury.

Assuming the allegations in the amended complaint to be true for purposes of the hearing on motions to dismiss, the District Court below found that the state judge participated in the alleged conspiracy in his role as judge. His action in the conspiracy, that is, entering the injunction, was a judicial act within his authority and jurisdiction. Thus, the District Court held, the state judge is immune from liability under Section 1983.

As to the complaint against the Petitioners and the other private alleged co-conspirators, the District Court held that a valid claim could not be stated against them under Section 1983. Because of the judge's immunity from suit, the other defendants had not conspired with a state officer against whom a valid claim could be stated under Section 1983.

By per curiam opinion dated January 17, 1979, a three judge panel of the Court of Appeals for the Fifth

Circuit, the Honorable Judges Wisdom, Godbold and Tjoflat, affirmed the trial court's dismissal of the complaint against both the state court judge and the private citizen defendants, including Petitioners. In that opinion, the Court of Appeals affirmed the dismissal of the complaint under the doctrine of judicial immunity as applied to 42 U.S.C., Section 1983 cases.

With respect to the private citizen defendants, including Petitioners, the Court below held that the private citizens, in allegedly conspiring with a state judge, did not conspire with a person against whom a claim valid under 42 U.S.C., Section 1983 could be stated, and thus themselves were entitled to dismissal of claims made against them under that statute.

No petition for rehearing was filed nor was any motion to stay issuance of the mandate filed. Then, on March 9, 1979, notice was given by the clerk of the Court of Appeals of the entry of an order by a then majority of judges in active service, on the Court's own motion, to rehear the cause by the Court en banc with oral argument. Through its clerk, the appeals court below notified Petitioners and the other parties of its intent to reconsider en banc the holding of the panel affirming the dismissal of the complaint as to the private alleged co-conspirators. The clerk's notice referred specifically to a footnote, number 13, in a recent opinion of this Court, *Stump v. Sparkman,* 435 U.S. 349, at 364, 55 L.Ed.2d 331, at 344, 98 S.Ct. 1099 (1978).

The cause was submitted on rehearing to the Court of Appeals en banc on June 5, 1979. By opinion dated October 22, 1979, by a ten to four decision, the Court of Appeals affirmed the panel's holding that the state court

judge was immune from suit, but reversed as to the private alleged co-conspirators.

The majority in the en banc opinion on rehearing reasoned that, even though the state court judge is immune from suit under Section 1983, his participation in the alleged conspiracy, that is, his granting the temporary injunction, still gave the alleged conspiracy the requisite action under color of state law. Since the conspiracy had the requisite state action, a claim could be maintained under Section 1983 against the private citizen alleged co-conspirators.

Dennis filed a petition for rehearing and suggestion for rehearing en banc on November 5, 1979, which was overruled by order of the Court of Appeals entered on December 14, 1979. Upon Dennis' motion for stay of issuance of mandate, the Court of Appeals stayed the mandate until February 1, 1980.

ARGUMENT AND AUTHORITIES

Petitioners adopt herein in its entirety the argument and authorities made by Orville E. Dennis in his Petition for Writ of Certiorari previously filed herein in No. 79-1186. The positions of Petitioners and Dennis on the question presented are identical.

SUMMARY

It is respectfully submitted that the Supreme Court should exercise its power of supervision over the federal circuit courts and resolve the issue in favor of the doctrine of judicial immunity.

CONCLUSION

For the reasons set forth above, Petitioners, Duval County Ranch Company, Inc. and Clinton Manges, prays that this Court enter its order directing that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit below, and upon such review that this Court reverse the Judgment below, and upon such review that this Court reverse the Judgment below insofar as it reverses the district court's dismissal of the complaint against Petitioner and the other defendants below, and that this Court affirm the Judgment of the district court below dismissing the complaint against this Petitioner and the other defendants below.

Respectfully submitted,

Duval County Ranch Company, Inc. and Clinton Manges

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Petition for Writ of Certiorari have been deposited with the United States Postal Service, with proper first-class postage affixed thereto, certified mail, return receipt requested, addressed to each of the following parties, or where represented by counsel, to the counsel of record in the court below: Mr. Garland Smith, P.O. Drawer 1104, Weslaco, Texas 78596; Mr. Clarence Martens, #5, Northwood, Del Mar Hills, Laredo, Texas; Mr. Finley L. Edmonds, Post Office Box 2624, 1515 Bank & Trust Tower, Corpus Christi, Texas 78403, and Hon. Mark White, Attorney General, Post Office Box 12548, Austin, Texas 78711, Attn: Ms. Laura Martin, Asst. Attorney General; on the _____ day of _____, 1980.

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Supreme Court U.S.
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OCTOBER TERM 1979

NO. 79-1385

CLINTON MANGES AND DUVAL COUNTY RANCH COMPANY, INC.,
Petitioners

v.

SIDNEY SPARKS and R. L. LYND, d/b/a SIDNEY SPARKS, TRUSTEE,
Respondents

REPLY BRIEF OF RESPONDENTS, SIDNEY SPARKS AND R. L. LYND, d/b/a SIDNEY SPARKS, TRUSTEE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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CLINTON MANGES AND DUVAL COUNTY
RANCH COMPANY, INC.
Petitioners

v.

SIDNEY SPARKS and R. L. LYND, d/b/a
SIDNEY SPARKS, TRUSTEE,
Respondents

REPLY BRIEF OF RESPONDENTS SIDNEY SPARKS AND R. L. LYND, D/B/A SIDNEY SPARKS, TRUSTEE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondents, SIDNEY SPARKS and R. L. LYND, d/b/a SIDNEY SPARKS, TRUSTEE (hereafter SPARKS-LYND), pray that the Petition of DUVAL

COUNTY RANCH COMPANY, INC. (hereafter DCRC) and CLINTON MANGES (hereafter MANGES), for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Fifth Circuit be denied, or if granted, that the en banc decision of the Court of Appeals for the Fifth Circuit be affirmed.

OPINIONS BELOW

The District Court's memorandum order is included in the Appendix to the Petition for writ submitted by ORVILLE E. DENNIS in No. 79-1186 at Page A-1. The panel decision of the Court of Appeals is reported in 588 F2d 124, and the en banc decision from which certiorari is sought is reported in 604 F2d 9.6.

JURISDICTION

Jurisdiction under 28 USC, Sec. 1254(1)

is not available to review the petition for certiorari filed by Petitioners DUVAL COUNTY RANCH COMPANY, INC. and CLINTON MANGES on March 7, 1980 to review the order of the Court of Appeals for the Fifth Circuit in Cause No. 77-12-49, for the reason that 28 USC Sec. 2101(c) requires that such petitions for certiorari be filed "within ninety days after the entry of such judgment or decree", and an excess of ninety days had expired before the petition was filed.

QUESTIONS PRESENTED

May the U. S. Supreme Court grant certiorari on a petition filed with the Clerk of the Supreme Court more than ninety days after entry of the decree of the Court of Appeals sought to be reviewed? If not, does the filing of a motion for rehearing by a party other than petitioner, extend the time for

the non-movant petitioner to the date of denial of the motion for rehearing.

STATUTES INVOLVED

The statute involved is 42 USCS, Section 2101(c), which reads as follows:

> "Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

and if timely filed, then 42 USCS, Section 1983 is involved. It reads as follows:

> "Sec. 1983. Civil action for deprivation of rights, Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the

> Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

The decree or judgment of the Court of Appeals, Fifth Circuit, was entered in this case on October 22, 1979. The petition for certiorari on behalf of DUVAL COUNTY RANCH COMPANY, INC. and CLINTON MANGES was not filed until March 7, 1980, some 136 days after the decree was entered. However, another defendant, ORVILLE E. DENNIS, timely filed a motion for rehearing, which was denied on December 14, 1979. If petitioner's time to file does not begin to toll until the latter date, then the March 7, 1980 filing is within the ninety days.

MANGES and DCRC participated below only through surrogates, having by letter of May 9, 1977 from their counsel chosen "to

adopt the briefs heretofore filed in behalf of O. P. Carrillo and Orville E. Dennis," and as to the en banc hearing, acting for DUVAL COUNTY RANCH COMPANY, INC. only, their counsel asked that it "be permitted to adopt the brief filed herein, filed by Appellees in the instant cause," and further that it "would not request any time for oral argument but instead would adopt the oral argument of Appellees herein." Neither petitioner participated in oral argument or filed briefs in the Court of Appeals.[1.]

The failure of petitioners to participate until the case reached the Supreme Court, or the late filing should dispose of

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1. Copies of such letters and the Clerk's reply are lodged with the Clerk for information of the Court, and copies are also served on other counsel and parties with copies of this Reply.

the petition. If not, we adopt briefs filed in 79-1186 and 79-1239 as answer on the merits. Petitioner's "Statement of the Case" (p. 3-6) says Respondents' complain of the granting of a wrongful injunction by the State Judge. At best, this is only a half truth. The crux of the complaint is that the wrongful injunction was induced by a bribe given by CLINTON MANGES, sole owner of DUVAL COUNTY RANCH COMPANY, INC., to the judge in exchange for the agreement of the judge to give up his judicial independence and subordinate his judicial mind to the corrupt will of Petitioners, which resulted, among other things, in the wrongful injunction. That the Court must accept as true the allegations of bribery, as pled, is a correct statement of the law, but falls short in stating the facts. The bribery was proved in proceedings

to disqualify the judge in a state court of competent jurisdiction and is res judicata as to petitioners. This takes from the case all speculation concerning the fact of bribery.

ARGUMENTS AND AUTHORITIES

DCRC and MANGES adopt as their argument that presented in ORVILLE E. DENNIS' petition for Writ of Certiorari filed in 79-1186, which Respondents answered. To the extent pertinent, SPARKS-LYND here adopt their Reply in said 79-1186.

This petition should be denied because of the failure of DCRC and MANGES to participate below, or because it was not filed "within ninety days after the entry of such judgment or decree" (28 USCS, Sec. 2101[c]). However, if the time for filing is suspended by the motion for rehearing filed by another party, ORVILLE E. DENNIS, until such motion

was denied on December 14, 1979, then the filing is within ninety days of denial of rehearing. Gypsy Oil Co. v. Escoe, 275 U.S. 498, 48 S.Ct. 112, 72 L.Ed. 393. If the date of entry of the final judgment controls (October 22, 1979), the petition is not timely filed, and the Court is without jurisdiction. Julia Boylan, et al v. United States of America, 66 L.Ed. 397.

We have been unable to find a case holding that under 28 USCS, Sec. 2101(c) a motion for rehearing by one litigant suspends running of time as to all. In SPARKS-LYND'S petition for certiorari in 79-1239, they construed 28 USCS Sec. 2101(c) as permitting them, as the opposing party, to file within ninety days after denial of the DENNIS motion for rehearing. Such construction would not

necessarily follow as to a party who did not join in the motion, and against whom it was not directed, such as DCRC and MANGES here. The Court, however, denied the petition in 79-1239. We are not certain whether it was denied for late filing, or on the merits. We felt strongly that, on the merits, it should have been granted.

In construing 28 USCS, Sec. 2101(b), the Supreme Court held timely a petition filed more than the alloted time after judgment, but within such time after denial of Appelle's motion to reconsider certain aspects of its judgment. Communist Party of Indiana v. Edgar D. Whitcomb, etc., et al (1974) 414 U.S. 441, 38 L.Ed. 2d 635, 94 S.Ct. 656. The same logic would seem to apply to civil cases under Section 2101(c), and to all parties, whether or not they join in the making or

opposing motions for rehearing, reconsideration, etc., but we do not find a clear cut ruling to this effect.

The motion for rehearing continues jurisdiction in the Court of Appeals, and includes the option in said Court to change its judgment or decree. NLRB v. McKay Radio & Tel. Co. (1938) 304 U.S. 333, 82 L.Ed. 1381, 58 S.Ct. 904. Such a change could render moot appeals prematurely commenced, and change the position of all parties with respect to appeal. Any other construction, results in general confusion and judicial inefficiency by fragmenting the case into separate appeals of its many parts and parties, as here, where we have three appeals (79-1186, 79-1239 and 79-1385) all involving the same cause of action below.

SUMMARY

Having assumed in Cause 79-1239 that the motion for rehearing filed by DENNIS (in 79-1186) suspended the tolling of time for SPARKS-LYND to file certiorari until December 14, 1979, we cannot consistently urge a contrary position as to petitioners in 79-1385. However, if we were wrong, and the petition in 79-1239 was denied as not timely filed (which was urged by DENNIS), then the petition in 79-1385 should likewise be denied as not timely filed.

CONCLUSION

For reasons set forth above, respondents SIDNEY SPARKS and R. L. LYND d/b/a SIDNEY SPARKS, TRUSTEE, pray that the petition for writ of certiorari filed hereby in DUVAL COUNTY RANCH COMPANY, INC. and CLINTON MANGES be denied; or if granted, that it be consoli-

dated with 79-1186 and the two heard together and that on final hearing the en banc decision of the Court of Appeals for the Fifth Circuit be affirmed.

Respectfully submitted,

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I hereby certify that three copies of the foregoing Reply Brief have been deposited with the United States Postal Service, with proper first-class postage affixed thereto, certified mail, return receipt requested, addressed to each of the parties or their counsel of record as indicated below, on this 8th day of May, 1980.

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